

BOOK REVIEWS

The Rule-Making Authority in the English Supreme Court. By Samuel Rosenbaum. Boston, The Boston Book Company. 1917. pp. xiv, 320.

The way out of our procedural entanglements is through the rule-making power of the courts. This is now the belief of most lawyers who have surveyed the field and arrived at a positive generalization. And yet in most states experience has been so contrary to this theory that it is hardly to be wondered at that a large share of all lawyers should either fail to get the basic meaning of the theory, or should be skeptical of its efficacy. For every conceivable reform we have been attached to legislative treatment, and though lawyers often point out to a benighted laity that legislation has its fixed limits they nevertheless appear to have almost unlimited confidence in its power to cure their own peculiar disorders.

The best way to understand what can be accomplished for procedure through judge-made rules is to observe the experience of a jurisdiction in which the theory has been put to a thorough test. Mr. Rosenbaum's book permits of such an investigation in an ideally direct and simple manner. England passed through, nearly a century ago, the stage of legislative, or compulsory, reform. A great deal was accomplished, but after all it amounted only to clearing the ground for really constructive work. The book tells in historical fashion how the rule-making power was confirmed by the Judicature Acts and how the various and perverse technical problems were solved one by one in succeeding years.

As a mere historical record the volume is interesting reading, which implies a high compliment to the author's literary powers. Nor does it lack aught in technical exposition. In it one can learn how the rule-making power needs to be organized for practical accomplishment and what takes place when a competent group of judges with power and responsibility are confronted with the great task of making justice real.

The author made his studies in England. His work correlates various reports and commentaries and is itself the only complete consideration of this function which has been written. In a preface Mr. T. Willes Chitty, Master of the Supreme Court of Judicature, editor of *The Yearly Practice, etc.*, endorses the work unreservedly.

In special chapters the work deals with the County Court rules and procedure. It throws a great deal of light on English court organization. It presents illuminating facts concerning the operation of the rule-making principle in all English speaking lands except the United States.

One of its best features lies in pointing out some of the blind alleys from which the Rules Committee from time to time has been forced to retreat, in this respect serving its purpose far better than certain writings on the subject by American lawyers who either observed superficially or else wrote quite without personal observation.

The book at once proves the absolute necessity for the full use of the rule-making power if justice is to be freed from shackles and at the same time suggests the successful organization of the function and details experiences which have proved successful and experiments which have failed.

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lature and executive, and the nature of the questions submitted, which usually involve the constitutionality of proposed legislation or of executive action or advice as to the powers or duties of governmental departments. He then discusses the form of the replies and their effect on the action of the interrogators.

Chapter III deals with the interpretation by the courts of advisory opinion clauses in constitutions, particularly as to the extent of discretion assumed by the courts in refusing advice. The law derived from the opinions rendered and the author's criticism is then synthetically presented in the form of codified rules, under each of which the author indicates the historical development of the rule, and expounds it by illustration and explanation. The line between rules *de lege lata* and *de lege ferenda* is always clearly drawn.

Chapter IV deals briefly with other forms of judicial influence, particularly the long disused revisory council in New York and Illinois, of which the judges were members. The proposal of legislation by the judiciary and other forms of judicial participation in the enactment of legislation in this country and in Latin America are also discussed. Chapter V on "The place of the advisory opinion" is a succinct summary of the author's thesis that the reconciliation of democracy and efficiency justifies and requires the adoption of the advisory opinion as a part of our governmental machinery. There seems little doubt that progress lies in the direction of "preventive" assistance to avoid social disturbance rather than in corrective relief to cure it, and therein may be found the hope for the ultimate general adoption as aids to effective legislation of the legislative reference bureau, of bill drafting experts and of the advisory opinion.

EDWIN M. BORCHARD

Cases on the Law of Private Corporations, selected by Daniel Frederick Burnett. Boston, Little, Brown & Co. 1917. pp. xxix, 828.

Case-books dealing with the leading subjects in the law are becoming as countless as the drops in the ocean. The reviewer, like several of his brethren in the law-teaching profession, has been guilty. As regards the case-book on corporation law compiled six years ago by Mr. Canfield and himself, the reviewer might submit, by way of atonement, that it was prepared to meet a practical existing need, inasmuch as the case-book of the late Judge Keener on the subject of corporations consisted of two huge volumes comprising almost two thousand pages, and could not be covered within the ordinary limitations of time allotted to the course in corporations. At that time, the satisfactory one-volume work of Mr. Richards in the American Case-book Series had unfortunately not yet appeared. In 1912, Richards' *Cases on Corporations* and Canfield & Wormser's *Cases on Corporations* were published, and both of these works were widely adopted in law schools. A few years later, Mr. Warren revised his case-book as to both size and scope. So that in 1914 there were three one-volume case-books on corporations from which to choose.

Now we have still another one-volume case-book on corporations,—this compilation by Mr. Burnett. Only a few years have elapsed since the appearance of the three books above mentioned. There have been no startling developments in the law during this interval and, in fact, there are very few valuable cases in Mr. Burnett's collection decided since the year 1914, when Mr. Warren's second edition appeared. Furthermore, a great number of the recent cases reported in Mr. Burnett's book are found in either the books of Warren, Canfield & Wormser, or Richards. Nor is there anything particularly original or striking about the arrangement of this new book. It seems a pity that Mr. Burnett did not

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devote his talents and ability to the preparation of a treatise on some phase of the law of corporations,—the disputed subject of rights of creditors, for example,—instead of getting out another case-book. Or are we coming to the stage when each teacher of a subject is going to write his own case-book on the topic? The reviewer has taught the law of corporations with Keener's *Cases*, with Smith's *Cases*, with Warren's *Cases*, and with Canfield & Wormser's *Cases*, and is frank to say that it does not make very much difference which book is used. The amount of legal reasoning which the class will acquire depends entirely upon the teaching power of the instructor. A good teacher can take two or three cases in any of the books and by using them dexterously and by putting the proper kind of hypothetical questions, can get just as much out of his class, and incidentally put just as much into his class, as is needed. The one-volume books are, however, more convenient to use and less expensive for the student.

To revert to Mr. Burnett's work,—the first three chapters, taken by way of illustration, bring out the lack of any real need for another one-volume case-book on corporations. Of the cases contained in the first chapter, which deals with the corporation viewed as an entity, only one case is new and not contained in one or more of the other collections. The value of that case, a one-judge decision at Special Term in New York County, may well be doubted. The other cases, *Thomas v. Dakin*, *Liverpool Insurance Co. v. Massachusetts*, *Hoadley v. County Commissioners of Essex*, *People v. Coleman*, and *Edwards v. Warren Linoline Works*, are all old friends. If the writer's memory serves him, each of these cases is contained in one or more of the other collections above mentioned.

The second chapter, which deals with the corporation viewed as a person, contains the well known cases of *Williamson v. Smoot*, *Button v. Hoffman*, and *Gallagher v. Germania Brewing Co.*, one or all of which are found in the other collections; and then Mr. Burnett publishes three New Jersey cases dated 1909, 1908 and 1855, showing a strong partiality to New Jersey law, which, however, hardly justifies three New Jersey cases, one after the other, in such an important chapter. In dealing with this topic of the corporation viewed as a person, it seems a grave error entirely to omit one of the many leading English cases on the topic. It is a serious mistake to minimize the value of the great "land-mark" cases, from which all the American cases flow.

The third chapter, which deals with the corporation viewed as a collection of individuals, contains three cases, of which two, namely, *U. S. v. Milwaukee Refrigerator Transit Co.* and *U. S. v. Lehigh Valley R. R. Co.*, are printed in one or more of the other one-volume collections. The other case, *Bank v. Trebein*, is not contained in the other collections. It is a case far inferior for classroom purposes to such a case as *Montgomery Web Co. v. Dienelt*, 133 Pa. State 585, which the Ohio Court in the *Trebein Case* relies upon and follows, and which is perhaps the leading case.

These remarks are not intended by way of disparagement of Mr. Burnett's labors, or to detract from the undoubted merits of his book. They simply illustrate the lack of need of another one-volume case-book on corporations.

The notes in Mr. Burnett's work are quite full. In the preface the author says: "In no instance, are they (the notes) designed to relieve the student from doing his own thinking and rendering his own appraisalment." Tested by this standard, the notes, when tried in the balance, are found wanting. Such a note as that at pp. 132-4 emphatically does not relieve the student from doing his own thinking. On the contrary, such a note is nothing more or less than an adaptation of text-book methods to the case-book. It would have been both franker and wiser for Mr. Burnett to confess that such topics as corporations do not lend themselves as readily to the pure case-book method as do some other legal subjects. It is necessary (judging from experience) to supplement the cases on many

topics in corporations with rather voluminous notes, in order to avoid a two-volume work. Again, such a note as that at pp. 226-7, quoting from the rule as laid down in 20 L. R. A. 291, hardly squares with Mr. Burnett's professions in his preface.

The fact of the matter is that there are certain topics in the law which lend themselves admirably to the pure inductive method. Such a subject is contracts. Another such subject is insurance. Other such subjects are torts, trusts and evidence. On the other hand, the reviewer has ascertained from classroom experience in teaching corporations (he deserves sympathy, as he has taught the subject twenty times) that it does not lend itself so well to the case-book method. The reviewer remembers that when Professor Gifford (one of the most brilliant and successful law teachers of this generation) was teaching this topic at Yale, he remarked to the reviewer that corporations was not the "teaching subject" that contracts and evidence are. The reason is obvious. It is because the student's grasp of corporation law cannot be attained inductively alone. In this respect, it differs from contracts and from many other legal subjects. The law of corporations does not "*build itself up*." Therefore, it is necessary to handle it in a somewhat different manner than contracts. A case-book on the subject needs full notes and these notes must be frankly inserted with a view to supplement the cases and with a fearless recognition of the fact that the simon-pure case-book method will not suffice in dealing with a rambling topic like corporation law.

The sooner this is openly recognized by law teachers, the better it will be. It is nothing short of absurd to try to apply to this topic the pure inductive method which works out so admirably in handling a topic like contracts. One does not use a 16-inch gun when going rabbit hunting. *Different conditions demand different methods of approach.*

A valuable feature of Mr. Burnett's work is the concluding chapter, which deals with the re-organization, consolidation and merger of corporations. This important subject has not hitherto been given sufficient attention by other writers, perhaps because of limitations of time and space.

The work contains an admirable index and an accurate table both of cases reported and of cases cited.

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A Manual on Land Registration, with a Full, Complete Annotated Copy of the Land Registration Act of the State of Georgia. By Arthur Gray Powell, LL.D. Atlanta, The Harrison Co. 1917. pp. 449.

To the person who has given any thought or study to Land Registration Acts or the Torrens System, so called, the effort of the State of Georgia to enact legislation upon this difficult question seems to have attained a fair measure of success, and the labors of the Commission which have been crystallized into this Act seem to have been performed after a careful painstaking study of the subject and to embody in a real way a scientific exposition of the principles which are needed in an Act which can be of legal value to a State. Much of the legislation on this subject which has been enacted in America in the past few years has been conceived in a spirit which has entirely misinterpreted the genius of American Institutions and has been an unscientific attempt to engraft upon those institutions a system which is totally unfitted to our constitutional form of government. So long as constitutional provisions for due process of law

remain unmodified and legislative and judicial departments remain distinct, this insurmountable obstacle exists to embodying in our title laws a system which had its roots and attains its perfection in countries unhampered by the restrictions and devoid of the guaranties of our American constitutional government. The Georgia Commission has very evidently had these dangers in mind, and they have succeeded in a marked degree in preparing a bill which approaches more closely to the ideal American Land Registration Act than any which has yet come under our notice, with the possible exception of the Act prepared under the direction of the American Bar Association.

One of the difficulties attending the effort to make an impartial study of this system lies in the fact that it is almost impossible to find any writing about the matter which is not essentially controversial. Public discussion of the Torrens Act and efforts to obtain legislation on the subject seldom fail to degenerate into a battle of personalities disfigured by mutual imputation of unworthy motives, and this in spite of the fact that the subject has engaged the attention of law makers and reformers for more than two hundred and fifty years.

This volume, which Judge Powell frankly acknowledges has been prepared by him as a practical handbook for the enlightenment and guidance of lawyers and the officers who are to administer the Act, accomplishes its avowed purpose in a convincing manner, and will without doubt be of great value not only to the profession but to the layman also. The subject is treated, notwithstanding the author's disclaimer, in a learned manner, his style is lucid and persuasive and the discussion treats the most minute detail of the law in an illuminating fashion. There can be no possible excuse for failure to understand any provision of the Act if the volume is used assiduously and intelligently by those charged with the operation of the Law.

The author recognizes the fact that he has been obliged to travel over uncharted paths, that the system being in its infancy has many obstacles to overcome, but the opinions which he has expressed as to the proper construction or as to the effect of the various sections of the Act are worthy of the highest consideration because they come from one who has diligently and faithfully studied his subject and knows whereof he speaks.

The State of Georgia has made a distinct addition to the complex subject of Land Registration and its legislation ought to point the way to the ultimate solution of the problems which are involved in establishing the system as a practical method of dealing safely and speedily with land titles, and Judge Powell has performed a notable public service, at considerable sacrifice to himself, in producing this book which so plainly and convincingly discusses and elucidates the questions involved.¹

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[¹The attention of the learned reader is called in this connection to two articles: William C. Niblack, *Pivotal Points in the Torrens System* (1915) 24 YALE LAW JOURNAL, 274; and James Edward Hogg, *Registration of Title to Land* (1918) 28 *ibid.*, 51.—ED.]